STATE OF MICHIGAN
IN THE SUPREME COURT

MARY ANN HEGADORN,
Plaintiff-Appellant,

v

DEPARTMENT OF HUMAN SERVICES DIRECTOR,
Defendant-Appellee
_____/

SC:
COA: 329508
Livingston CC: 2014-028394-AA

ESTATE OF DOROTHY LOLLAR, by DEBORAH D TRIM, Personal Representative
Plaintiff-Appellant,

v

DEPARTMENT OF HUMAN SERVICES DIRECTOR,
Defendant-Appellee
_____/

SC:
COA: 329511
LivingstonCC: 2014-028395-AA

ROSELYN FORD,
Plaintiff-Appellant,

v.

DEPARTMENT OF HUMAN SERVICES DIRECTOR,
Defendant-Appellee

SC:
COA: 331242
Washtenaw CC: 15-000488-AA

APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF PLAINTIFFS-APPELLANTS MARY ANN HEGADORN, ROSELYN FORD, and THE ESTATE OF DOROTHY LOLLAR

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

FEDERAL STATUTES

OTHER AUTHORITY

STATEMENT OF ORDER APPEALED FROM

Plaintiffs-Appellants seek leave to appeal the Court of Appeals' June 1, 2017 decision[1] reversing the Livingston County Circuit Court's September 10, 2015 Orders and Washtenaw County Circuit Court's December 22, 2015 Order reversing administrative decisions that affirmed the denial of the Plaintiffs-Appellants applications for Medicaid benefits.[2]

The Plaintiffs-Appellants are requesting this Supreme Court to grant their Application for Leave and reverse and vacate the Court of Appeal's opinion dated June 1, 2017, regarding the Court of Appeals interpretation of the meaning of the term "individual" contained in 42 USC 1396p(d)(3)(B), and also to reverse the Court of Appeals determination that the retroactive application by Department of Health and Human Services of its long-standing interpretation of the Federal law and its rules, which was relied upon by these applicants, was not a violation of the arbitrary and capricious standard of Michigan's Administrative Procedures Act.

The issues raised in this appeal will have a substantial and profound effect on all future applicants who must deal with the Department of Health and Human Services regarding the Department's interpretation of any administrative rule or federal statute that pertains to programs administered by the Department, particularly married persons. The Department will be allowed to continue to misapply the provisions of 42 USC 1396p(d)(3)(B), but even more importantly will be permitted to misinterpret and misapply other provisions of the Medicaid laws based on the sweeping

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[1] The Court of Appeal's Order dated June 1, 2017 is attached as Appendix 1

[2] The Livingston County Circuit Court Order for *Hegadorn v Dep't of Human Servs Dir* is attached as Appendix 2, the Livingston County Circuit Court Order for *Lollar v Dep't of Human Servs Dir* is attached as Appendix 3, and the Washtenaw County Circuit Court Order for *Ford v Dep't of Health and Human Servs* is attached as Appendix 4.

statements of Congressional intent regarding the countability of the assets of applicants and their spouses, which statements of Congressional intent are not based on an actual analysis of the intricacies and complexity of the Medicaid laws and the rules contained therein for determining when “assets” are or are not “countable resources”.

Further, the Department of Health and Human Services and any other administrative department of this state will be free to change its “interpretation” of its rules (and the controlling statutes) without any advance notice to the citizens of the state, and apply those changes retroactively, regardless of reliance by those citizens on the prior interpretations.

STATEMENT OF THE QUESTIONS PRESENTED

I. DOES THE STATUTORY TERM "INDIVIDUAL" AS USED IN 42 USC 1396p(d)(3)(B) MEAN "THE INDIVIDUAL OR THE INDIVIDUAL'S SPOUSE".

The Administrative Law Judge in effect answered this question yes.
The Circuit Courts answered this question no.
The Court of Appeals answered this question yes.
The Plaintiff-Appellant answers this question no.
The Defendant-Appellee has answered this question yes.

II. WAS THE RETROACTIVE APPLICATION BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF ITS CHANGE OF ITS LONG-STANDING INTERPRETATION OF THE FEDERAL LAW AND IT RULES TO APPLICANTS WHO RELIED ON THE PRIOR INTERPRETATION AND SUBMITTED APPLICATIONS PRIOR TO THE DEPARTMENT ISSUING ANY NOTICE OF THE CHANGE, A VIOLATION OF THE ARBITRARY AND CAPRICIOUS STANDARD OF MICHIGAN'S ADMINISTRATIVE PROCEDURES ACT, AND THEREFORE UNLAWFUL.

The Administrative Law Judge did not answer this question.
The Circuit Courts answered this question yes.
The Court of Appeals answered this question no.
The Plaintiff-Appellant answers this question yes.
The Defendant-Appellee has answered this question no.

STATEMENT OF FACTS

These cases involve three institutionalized individuals who applied for Medical Assistance (Medicaid) to assist with the payment of nursing home costs under the federal Medicaid system commonly referred to as "Title XIX": Dorothy Lollar, Mary Ann Hegadorn, and Roselyn Ford. Title XIX is a federal aid program that allows participating states, through the use of federal funds, to furnish medical assistance. The Department[3] denied all three individuals' applications for Medicaid benefits because the Department counted assets that were placed by the institutionalized individual's spouse into a "Solely for the Benefit of" Trust before applying for Medicaid benefits for the institutionalized individual. These cases were consolidated before the Court of Appeals.

Under the terminology used in Michigan, for this Medicaid program at issue, Mrs. Lollar, Mrs. Hegadorn, and Mrs. Ford are referred to as the "institutionalized spouse,"[4] and their respective spouses are referred to as the "community spouse".[5] In such a situation, the Michigan "Bridges Eligibility Manual Item 402 ("BEM 402") contains the general rules for calculating what is referred to as the "protected spousal amount" or "community spouse resource allowance" ("CSRA") of countable assets for the community spouse[6]. This is determined by first performing what is referred

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[3]In this Application, the Defendant-Appellee, Maura D. Corrigan, Director of the Michigan Department of Human Services, is referred to as the "Department".

[4] Bridges Eligibility Manual ("BEM") Item 402, p 3; the entirety of BEM 402 as it existed on July 31, 2014, is attached as Appendix 5

[5] Id at p 2

[6] See Appendix 5, pp 4 & 6 (BEM 402, pp 4 & 6); also see 42 USC 1396r-5(f)(2).

to as an Initial Asset Assessment (IAA). That calculation begins by first adding up all of the "countable" assets of the couple as of the first day of the first continuous period of care that began on or after September 30, 1989,[7] and dividing that in half.[8] Using that formula, the "community spouse" is then allocated one half of those total countable assets up to a maximum specified by statute as that spouse's share of the couple's countable assets.[9] As mentioned above, this is known as the "protected spousal amount" or "community spouse resource allowance" ("CSRA"), and the maximum for this "protected spousal amount" in 2013 was $115,920 and 2014 was $117,240.[10] The protected spousal amount calculated by the Department for Mr. Lollar was $31,267.31,[11] for Mr. Hegadorn was $115,920, [12] and for Mr. Ford was $117,240[13].

The next step in the process of determining whether the Medicaid applicant qualifies is for the Department to apply the formula for asset eligibility specified in BEM 402, which is:

SSI-Related MA Only

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[7] Appendix 5 p 7 (BEM 402, p 7)

[8] Id. at 9.

[9] Id.

[10] See BEM 402 for July 2015, attached as Appendix 6; for unknown reasons, the applicable maximum "protected spousal amount" for 2014 does not appear in BEM 402 until July 2015; See BEM 402, p 9. However, Mr. Hegadorn was allowed an additional $9,315.78, pursuant to a probate court protective order (see page 64 of DHS Hearing Summary Notice, and Tr. ALJ Hearing held 11/5/2014, page 23-24).

[11] See Lollar ALJ Decision, p 2, attached as Appendix 7

[12] See Hegadorn ALJ Decision, p 2, attached as Appendix 8

[13] See Ford ALJ Decision, p 3, attached as Appendix 9

The formula for asset eligibility is:

- The value of the couple's (his, her, their) **countable assets** for the month being tested.
- MINUS the protected spousal amount (see below).
- EQUALS the client's **countable assets**. Countable assets must not exceed the limit for one person in BEM 400 for the category(ies) being tested.

Exception: The client is asset eligible when the countable assets exceed the asset limit, if denying MA would cause undue hardship; see UNDUE HARDSHIP in this item. Assume that denying MA will not cause undue hardship unless there is evidence to the contrary.[14]

When determining the couple's "**countable assets**" the Department is directed to "Use SSI-related MA policy in BEM 400 to determine countable assets."[15] For "SSI-Related Medical Assistance," such as these cases, BEM 400 refers to BEM 401 for analysis of when trust assets are "available."[16]

However, the determination of the amount of countable assets for an initial eligibility determination is made "as of the time of application for benefits".[17] Prior to the submission of the applications in all of these cases, a Trust was prepared which qualifies as a "Sole Benefit Trust" or "Solely for the Benefit Of" (SBO) Trust for the community spouse.[18] For nearly twenty years, the DHHS policy has considered assets in properly drafted and structured SBO Trusts for community spouses as non-countable for purposes of determining the Medicaid eligibility of the nursing home

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[14] BEM 402, p 4; emphasis added.

[15] Id. at p 3

[16] BEM 400, p 25

[17] See 42 USC 1396r-5(c)(2).

[18] See ALJ Decisions, p 2

spouses. As explained by Douglas G. Chalgian, *Michigan Medicaid Planning Handbook* (ICLE 2006), § 6.20:

> Medicaid policy provides that it is not a divestment to transfer assets to a spouse or to a trust "solely for the benefit of' a spouse (SBT) ...* [T]he ability to transfer assets to a trust solely for the benefit of the community spouse provides planners with the best planning option currently available for couples, a strategy that can provide nearly immediate eligibility with minimal difficulty. The SBT is recognized in PEM Item 405, at 6-7, as an exception to the divestment rules. If an applicant transfers assets to the trustee of an irrevocable trust that is in writing, solely for the benefit of the community spouse, and actuarially sound, the transfer of these funds will not be a divestment. Pursuant to this rule, an applicant may transfer an unlimited amount of resources into a trust, excluding them from being considered as resources for Medicaid eligibility purposes while retaining the ability to have the resources transferred back to the community spouse in the future ...

More recently, in *Medicaid & Health Care Planning Update 2015* (ICLE), David L. Shaltz stated:

> After Congress enacted the Omnibus Budget Reconciliation Act of 1993, elder law practitioners in Michigan began using irrevocable "solely for the benefit of' (SBO) trusts as a health care planning option for married couples in which one spouse was applying for the Medicaid program to help pay for long term care costs. SBO trusts appear in ICLE materials as early [as] the 1997 Fundamentals of Medicaid Planning seminar in which John E. Bos presented a session on "Basic Medicaid Planning Techniques: How They Work." Through the years SBO trusts have always been accepted by the Michigan Department of Human Services as a lawful means of preserving assets for the spouse of a person who applies for Medicaid to help pay for long term care services.

Specifically, Shaltz noted:

> Up until August 2014, the DHHS interpreted policy in BEM 401 in a way that made irrevocable SBO trusts a viable spend down option for married couples. That policy identified the following features for an SBO trust to receive this treatment:
>
> - The trust is a "Medicaid Trust" because it is created by the Medicaid applicant or her or his community spouse, i.e., persons whose assets must be counted to determine Medicaid eligibility, and

- It is an irrevocable trust, and
- It is a trust "solely for the benefit of' the community spouse and the distributions from the trust are made on [an] actuarially sound basis, and
- The first distribution from the trust to the community spouse occurs **after** the date the Medicaid application is processed by DHHS. (Emphasis in original).

If a trust met these criteria, DHHS treated the assets used to fund the trust as noncountable resources because there was no circumstance under which the community spouse could receive distribution from the trust at the time the agency processed the Medicaid application. The transfer of funds to the trust was not divestment because under DHHS policy in BEM 405, transfers to another solely for the benefit of a spouse is a transfer that is not a divestment. Under BEM 402, any distribution from the trust to the community spouse after the other spouse qualifies for Medicaid does not affect the Medicaid recipient's continuing eligibility for program benefits.

After the applications had been filed in all of these cases, and without any advance public notice, Terrence M. Seurer, director for the Department's Field Operations Administration, issued a memorandum on August 20, 2014 stating that "'all SBO trust assets are deemed countable pursuant to BEM, page 11."[19] At the time of the Department's announcement, there had been no change in the federal law or regulations, or the written Department's policies contained in the BEMs governing MA applications. What changed was only the Department's longstanding interpretation of the policy governing SBO trusts. As a result, SBO trust resources, which had always been treated as noncountable assets, were now treated as countable assets in evaluating an applicant's eligibility for Medicaid. Ms. Schrauben, who serves as the Departmental specialist, Office of Legal Services, for the Department, testified in all three cases that prior to August 13, 2014, that the assets of a Sole

[19] Department's memo dated 08/20/2014, attached as Appendix 10

Benefit Trust such as these were non-countable.[20]

In all of these cases, the Department denied Medicaid benefits, determining that the institutionalized spouse's countable assets, including the assets that were placed in the Sole Benefit Trust, exceeded the applicable eligibility limit.

The Administrative Law Judge in all three cases determined that the SBO Trust assets were countable in determining eligibility. In all of these cases, the Circuit Court reversed the Administration Law Judge's opinion. In Lollar and Hegadorn, which were consolidated for appeal before the Livingston County Circuit Court, the Circuit Court reversed the decision of the Administrative Law Judge on the basis that the assets held under this Sole Benefit Trust are not countable as of the date of the filing of Appellants' Medicaid application, pursuant to applicable federal law, and also on the basis that Appellants' Medicaid application should have been processed using the Department's policy interpretation which was in place at the time of the filing of the application for benefits, i.e., that SBO trusts are a non-countable asset. [21] In Ford, the Circuit Court reversed the ALJ's decision relying on the Lollar and Hegadorn decision.[22]

On October 1, 2015, the Department appealed to the Court of Appeals for Lollar and Hegadorn, and they were consolidated on December 22, 2015. On January 22, 2016, the Department appealed to the Court of Appeals for Ford, and the Court of Appeals consolidated that case with Lollar and Hegadorn on April 27, 2016. In an unpublished opinion, the Court of Appeals reversed

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[20] See Lollar Tr. ALJ hearing, held 11/5/2014, p 27; Hegadorn Tr. ALJ hearing pp 58-59; Ford Tr. ALJ hearing, held 3/19/2015, p 30

[21] Lollar and Hegadorn Tr. Cir Court hearing held 9/10/2015, pp 29-30.

[22] Ford Tr. Cir Court hearing held 11/19/2015, pp 11-12, and Court of Appeals Opinion, dated 6/1/2017, p 6

the circuit courts' orders ruling that the assets placed by an institutionalized individual's spouse into an SBO Trust are countable assets for determining whether an individual is eligible for Medicaid benefits. In reversing the Circuit Courts' Orders, the Court of Appeals determined that the term "individual" as used in a Federal Statute, specifically, 42 USC 1396p(d)(3)(B) (and corresponding term "person" as used in the related Michigan Bridges Eligibility Manual Item 401) includes both the "individual" and the "individual's spouse," although the term "individual's spouse" no where appears in that statutory provision.

Because the Court of Appeals failed to engage in any meaningful analysis of 42 USC 1396p to determine how the term "individual" is used in the context of that statute, Appellants file this application for leave to appeal.

SUMMARY OF THE ARGUMENT

The Opinion of the Court of Appeals as issued for these cases does not discuss, or explain, the meaning of the term "individual" as used in the context of 42 USC 1396p(d), and especially 42 USC 1396p(d)(3)(B). When 42 USC 1396p(d) is reviewed in context, it is apparent that the term "individual" as used in the part of this statute which sets forth the rule for counting the assets of a trust, is referring to the "Medicaid applicant," because the spouse of the Medicaid applicant is referred to separately and not by the term "individual". In other words, the "ordinary" dictionary meaning of "individual" cannot be relied upon here, because these Medicaid statutes use the term "individual" in a particular manner to mean the Medicaid applicant only. The Opinion of the Court of Appeals in these cases does not undertake an actual analysis of usage of this term within the statutory text, which is critical to arriving at the correct statutory meaning.

Moreover, there is no dispute that the Department dramatically changed its prior policy interpretation that had been in place for well over a decade. Before that change was put into place by the Department starting on August 13, 2014, the Department did not "count" assets held under a spouse sole benefit trust under the circumstances presented by these cases. However, apparently effective August 13, 2014, the Department completely changed that interpretation and viewed such assets as completely countable. That interpretation change should not have been applied to applications filed before the Department made that change, and by doing so, the Department exceeded its statutory authority.

ARGUMENT

I. STANDARD OF REVIEW

This Court applies various standards of review to this case. First, this Court reviews questions of constitutional law de novo.[23]

Second, issues of statutory interpretation are also reviewed de novo.[24]

Finally, pursuant to 1963 Const, art 6, § 28, the standard of review for a judicial or quasi-judicial administrative agency action is whether it is "'authorized by law'" and its factual findings are "'supported by competent, material and substantial evidence on the whole record.'"[25] However, there

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[23] *Elba Twp v Gratiot Co Drain Comm 'r,* 493 Mich 265, 277; 831 NW2d 204 (2013).

[24] *State ex rel Gurganus v CVS Caremark Corp,* 496 Mich 45, 57; 852 NW2d 103 (2014).

[25] *Viculin v Dep't of Civil Serv,* 386 Mich 375, 384; 192 NW2d 449 (1971), quoting Const 1963, art 6, § 28; see also *Midland Cogeneration Venture Ltd Partnership v Naftaly,* 489 Mich 83, 97; 803 NW2d 674 (2011) (holding that "the Michigan Constitution guarantees judicial review ... and this guarantee may not be jettisoned by statute")

are not factual findings at issue in these cases.

II. WHEN INTERPRETING THE TERM "INDIVIDUAL" CONTAINED IN 42 USC 1396P(D)(3)(B), THE COURT OF APPEALS HAS FAILED TO FOLLOW, AND INDEED HAS VIOLATED, THE RULES WHICH COURTS ARE REQUIRED TO FOLLOW WHEN UNDERTAKING STATUTORY INTERPRETATIONS.

Instead of reviewing and interpreting the specific provisions of 42 USC 1396p and 42 USC 1396a(a)(10)(G) to determine the meaning of "individual" as used in section 42 USC 1396p(d)(3)(B), the Court of Appeals shifted the focus of its review to its characterization of Congress' purported general intent for "considering" the "assets" of the Medicaid applicant and the applicant's spouse. In doing so, the Court of Appeals over-simplified and over-stated Congressional intent for these statutes and ignored the fact that the terms "assets" and "resources" as used in the Medicaid statutes have specialized meanings, which in most cases are subject to the "availability rule" of 20 CFR 416.1201(a) [see further discussion below, under part III B.]. When a statute specifically defines a given term, that definition alone controls.[26]

The Court of Appeals further ignored how the term "individual" is used throughout 42 USC 1396p, and other sections of the Social Security Act, and in particular how that term is used in 42 USC 1396p(d)(3)(B).

When the Court of Appeals decided that the term "individual" as used in 42 USC 1396p(d)(3)(B) included the "individual's spouse," it failed to give effect to every word and phrase of 42 USC 1396p and 42 USC 1396a(a)(10)(G). According to the Court of Appeals, Congress intended the term "individual" as used in this statute to include the "individual's spouse". But that

[26] *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

ruling renders "nugatory" or as mere "surplusage" most of the approximately 17 times that 42 USC 1396p uses the term "individual's spouse." Such is a result is contrary to the established rules of statutory interpretation.

The meaning of the phrase "if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual**," hinges on the meaning of the term "**individual**". In this complex statute, the doctrine of *noscitur a sociis* requires that the term "individual" be viewed in light of the words surrounding it.

> "Contextual understanding of statutes is generally grounded in the doctrine of noscitur a sociis: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed.), p. 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting."[27]
>
> However, our inquiry does not stop there. Next, we apply noscitur a sociis to the individual phrases of [the statutory section being interpreted], as well as to the other provisions of [the statute] because the emphasized language does not stand alone, and thus it cannot be read in a vacuum. Instead, "[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute...." . . . "[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." . . . . Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. . . . . "In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." . . . . "It is a familiar *422 principle of statutory construction that words grouped in a list should be given related meaning."[28]

A court is not permitted to read into the statute what is not within the Legislature's intent **as derived**

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[27] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 317–18; 645 NW2d 34, 42 (2002); citations omitted

[28] *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710, 713 (2003), citations omitted

from the language of the statute.[29] In reviewing the statute's language, every word should be given meaning, and the court should avoid a construction that would render any part of the statute surplusage or nugatory.[30]

The Court of Appeals interpretation essentially rewrites 42 USC 1396p(d)(3)(B) to add "or the individual's spouse" – terminology that was specifically rejected by Congress. Further, such interpretation renders "nugatory" the phrase "individual's spouse" wherever that appears, because according to the Court of Appeals, the term "individual" means both the individual applicant as well as the individual applicant's spouse. If that interpretation were correct, then there would be no need for Congress to mention "individual's spouse" anywhere in 42 USC 1396p.

At the very least, the foregoing analysis demonstrates that the meaning of the term "individual" as used in 42 USC 1396p(d)(3)(B)is open to serious question and cannot be resolved on the basis of a purely mechanical or literal interpretation.

Also, words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the Act as a whole.[31] Further, any "attempt to segregate any portion or exclude any portion [of a statute] from consideration is almost certain to distort the legislative intent."[32] Rather, when interpreting a statute, its words "should not be construed in the

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[29] *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999); *Am Fedn of State, Co & Muni Employees v City of Detroit*, 468 Mich 388, 399–400; 662 NW2d 695, 702 (2003)

[30] *Altman v Meridian Twp*., 439 Mich. 623, 635, 487 N.W.2d 155 (1992); *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686, 690 (2001).

[31] *Gen Motors Corp v Erves*, 399 Mich 241, 255; 249 NW2d 41, 47 (1976)

[32] *Robinson v City of Lansing*, 486 Mich. 1, 16, 782 NW2d 171 (2010)

void, but should be read together to harmonize the meaning, giving effect to the Act as a whole."[33]

When the Court of Appeals decided that the term "individual" as used in 42 USC 1396p(d)(3)(B) included the "individual's spouse," it completely ignored the directive contained in 42 USC 1396a(a)(10)(G) which says that "for purposes of determining eligibility for medical assistance under the State plan, the state will disregard the provisions of subsections (c) and (e) of section 1382b of this title". As shown below, 42 USC 1382b(e)(3)(B) (which says that the states are not to apply to medical assistance determinations) specifically states that when "there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual** (**or of the individual's spouse**)," then the trust assets "shall be considered a resource available to the **individual.**"[34] This is precisely the result of the Court of Appeals rulings in these cases, and **precisely what Congress has told the states they cannot do.** The Court of Appeals interpretation overrides this statutory directive because it includes the "individual's spouse" under 42 USC § 1396p(d)(3)(B) even though Congress did not include that term in that section. Clearly, when Congress intends to include the "individual's spouse" within the dictates of a section, it does so specifically and not by implication. Such is a result is contrary to the established rules of statutory interpretation.

III. THE COURT OF APPEALS HAS NOT PROPERLY INTERPRETED THE CONTROLLING FEDERAL STATUTE, 42 USC 1396p(d)(3)(B).

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[33] *General Motors Corp* at 255; *Houston v Governor*, 491 Mich 876, 878; 810 NW2d 255, 257 (2012) [in lieu of granting leave, Crt of Appelas reversed]

[34] 42 USC 1382b(e)(3)(B); emphasis added

A. The Court of Appeals interpreted 42 USC 1396p(d)(3)(B) without taking into account the provisions of the rest of that section or related sections that bear on that interpretation.

The seminal issue in each of these cases is the proper interpretation of the term "individual" as used in 42 USC 1396p(d)(3)(B) (and the corresponding term "person" as used in the related Michigan Bridges Eligibility Manual Item).[35] That statutory section (and corresponding Bridges Eligibility Manual Item) sets forth a portion of the Medicaid rules to be used when evaluating how assets held under certain trusts are to be "counted" when a person is applying for "SSI-Related Medicaid"to assist with the payment of nursing home expenses.[36] That section reads as follows:

> B) In the case of an irrevocable trust—
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual**, the portion of the corpus from which, or the income on the corpus from which, payment to the **individual** could be made shall be considered resources available to the **individual**, and payments from that portion of the corpus or income—
> (I) to or for the benefit of the **individual**, shall be considered income of the **individual**, and
> (II) for any other purpose, shall be considered a transfer of assets by the **individual** subject to subsection (c) of this section; and
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the i**ndividual** shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the **individual** for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.[37]

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[35] Michigan Bridges Eligibility Manual Item 401 is attached as Appendix 11

[36]The Applicants in these cases applied for Medical Assistance (Medicaid) to assist with the payment of nursing home costs under the federal Medicaid system commonly referred to as "Title XIX". The category of Medical Assistance for which they applied is known in Michigan as "SSI-Related Medical Assistance." Title XIX (i.e. 42 USC 1396 et seq)

[37] 42 USC 1396p(d)(3)(B); emphasis added.

[emphasis added].

The Court of Appeals has interpreted the term "individual" in this provision to mean "the individual or the individual's spouse" (although that section includes no such wording). However, when arriving at that conclusion, the Court of Appeals did not engage in any meaningful analysis of the rest of 42 USC 1396p to determine how the term "individual" is used in the context of that statute. Throughout that statute, whenever Congress intends to include the spouse of the "individual" who is applying for or receiving Medicaid, it says so specifically.

The Department has argued repeatedly in the briefs it filed below that **both** the SSI rules of 42 USC 1382b(e) and the Medicaid rules of 42 USC 1396p(d), apply to the determination of whether the assets of an irrevocable trust that designate the **applicant's spouse** as the beneficiary are to be counted as resources of the Medicaid applicant, even where the Medicaid applicant is not the beneficiary. The Department's argument is based on the fact that 42 USC 1382b(e) specifically includes the "**individual's spouse**" within its provisions.

However, it is important to note that the provisions of 42 USC 1382b(e) are specifically stated **not to be applicable** to the Medicaid medical assistance program.[38] In particular, 42 USC 1396a(a)(10)(G) states:

> "A State plan for medical assistance must -
> (10) provide -
> (G)that, in applying eligibility criteria of the supplemental security income program under subchapter XVI for purposes of determining eligibility for medical assistance under the State plan of an individual who is not receiving supplemental security income, **the State will disregard the provisions of subsections (c) and (e)**

[38] 42 USC 1396a(a)(10)(G)

of section 1382b of this title;[39]

Nevertheless, a comparison of 42 USC 1382b(e) to 42 USC 1396p(d) is needed to aid in the interpretation of 42 USC 1396p(d).

> We will begin with a review of the provisions of 42 USC 1396p(d), which reads as follows:
> (d) Treatment of trust amounts
> (1) For purposes of determining an **individual**'s eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such **individual**.
> (2)
> (A) For purposes of this subsection, an **individual** shall be considered to have **established** a trust if assets of the **individual** were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:
> (i) The **individual**.
> (ii) The **individual's spouse**.
> (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the **individual's spouse**.
> (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the **individual's spouse**.[40]

The Court of Appeals relies in part on 42 USC 1396d(d)(2)(A)(i)-(ii) for its ruling that "The Legislature has clearly indicated that an institutionalized individual's assets includes not only those that he or she has, but also those that his or her spouse has . . . and that remains true even when those assets are placed into a trust by the spouse".[41] However, a careful review of this provision reveals that it says absolutely nothing about when trust assets are to be counted as resources – it only addresses who will " be considered to have established a trust" (and states " the rules specified in paragraph (3) shall apply to such a trust).

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[39] 42 USC 1396a(a)(10)(G); (emphasis added)

[40] 42 USC 1396p(d); emphasis added.

[41] Court of Appeals opinion, p 11, citing 42 USC 1396d(d)(2)(A)(i)-(ii)

But next we should look at 42 USC 1382b(e) to see how Congress worded that provision, which reads as follows:

> (e) Trusts
>
> (1) In determining the resources of an **individual**, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the **individual**.
>
> (2)
>
> (A) For purposes of this subsection, an **individual** shall be considered to have established a trust if any assets of the **individual** (or of the **individual's spouse**) are transferred to the trust other than by will.
>
> (B) In the case of an irrevocable trust to which are transferred the assets of an **individual** (or of the **individual's spouse**) and the assets of any other person, this subsection shall apply to the portion of the trust attributable to the assets of the **individual** (or of the **individual's spouse**).[42]

These two provisions are obviously very, very similar, although not identical. However, one thing is clear, 42 USC 1396p(d) which deals with determining a Medicaid applicant's eligibility for Medicaid refers to that person as the "**individual**." The other thing that is clear from a review of both of these sections is that when Congress intends to refer to the Medicaid applicant's spouse, it does so specifically and refers to that spouse as the "**individual's spouse**". Also, under either provision, the individual who has applied for Medicaid is considered as having created the Trust, but that provision does not tell us when to count trust assets as a "resource," so we must still examine the rest of 42 USC 1396p(d) to find out those rules.

Now, returning to 42 USC 1396p(d)(3)(B), that provision goes on to provide:

> B) In the case of an irrevocable trust—
>
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual**, the portion of the corpus from which, or the

[42] 42 USC 1382b(e); (emphasis added)

> income on the corpus from which, payment to the **individual** could be made shall be considered resources available to the **individual**, and payments from that portion of the corpus or income—
>
> (I) to or for the benefit of the **individual**, shall be considered income of the **individual**, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the **individual** subject to subsection (c) of this section; and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the **individual** shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the **individual** for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.[43]

This provision deals specifically with when the "resources" of a trust are to considered "available" to the individual, and the tells us that "if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual**" then that portion of the trust "shall be considered resources available to the **individual**". But who is this "individual"? The earlier part of this same statute section refers to the "individual" and the "individual's spouse" separately. At no place in 42 USC 1396p(d)(3)(B) is the "individual's spouse" mentioned.

On the other hand, 42 USC 1382b(e)(3)(B) provides:

> (B) In the case of an irrevocable trust established by an **individual**, if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual** (**or of the individual's spouse**), the portion of the corpus from which payment to or for the benefit of the **individual** (or of the **individual's spouse**) could be made shall be considered a resource available to the **individual**.

So, we can again see that if Congress wants to include the "**individual's spouse**" within this resource available rule for trusts, it says so specifically. For programs under 42 USC 1396p (Title

[43] 42 USC 1396p(d)(3)(B); emphasis added.

XIX Medicaid), Congress specifically has stated that the rules shown in 42 USC 1382b(e) do **not** apply, and Congress specifically did not include the **individual's spouse** within the provisions of 42 USC 1396p(d)(3)(B). Elementary statutory construction dictates that a court is not to add provisions to a statute that the legislative body did not include. The fact that Congress expressly rejected the trust standard of 1382b(e) means that there can be no question that Congress expressly rejected inclusion of the "individual's spouse" in 1396p(d)(3)(B). This is conclusive evidence that the "any circumstance" test does not apply to trusts that can distribute to the spouse of a Medicaid applicant, when the Medicaid applicant is not a beneficiary of that trust, and the Court of Appeals ruling to the contrary is erroneous. Where the evidence is clear that Congress "expressly declined to enact" a provision, the court cannot find that Congress sub silentio intended to include the provision:

> "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U. S. 359, 392-393 (1980) (Stewart, J., dissenting); cf. Gulf Oil Corp. v. Copp Paving Co., 419 U. S. 186, 200 (1974); Russello v. United States, 464 U. S., at 23.[44]

It is undisputed that **the Medicaid applicant** in each of these cases can receive **no distribution** from the Sole Benefit Trusts in issue, because those applicants are not a beneficiary of their husband's Trust. Therefore, 42 USC 1396p(d)(3)(B) does not cause the assets of any of these Sole Benefit Trust, which are not payable to the "individual" Medicaid applicant at any time, to be "considered a resource available to" that individual Medicaid applicant. In other words, under the provisions of

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[44] *INS v Cardoza-Fonseca*, 480 US 421, 442-443, (1987)

1396p(d)(3)(B), the sole benefit trust "established" for the spouse (which by the definition of "sole benefit" cannot distribute to the individual Medicaid applicant), is not tested by the "any circumstance" test of 42 USC 1396p(d)(3)(B). Each of these Trusts is akin to an annuity which makes a stream of payments over time to the husband of each Medicaid applicant, and whether such "assets" are "countable" as a a "resource" which is "available" to the spouse is determined under the other Medicaid rules for making such determinations.

B. The Court of Appeals basis for interpreting Congress intent do not support its conclusions.

The Court of Appeals cites 42 USC 1396p(h)(1) as support for its conclusion that "The Legislature has clearly indicated that an institutionalized individual's assets includes not only those that he or she has, but also those that his or her spouse has". The Court of Appeals arrives at that this blanket announcement, by completely ignoring the rest of 42 USC 1396p(h) (as well as the fact that not all "assets" are actually "countable" resources). Section 42 USC 1396p(h) reads in full as follows:

> (h) Definitions
> In this section, the following definitions shall apply:
> (h)(1) The term "assets", with respect to an individual, includes all income and ***resources*** of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action--
> (A) by the individual or such individual's spouse,
> (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
> (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.
> (h)(2) The term "income" has the meaning given such term in section 1382a of this title.

> (h)(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.
> (h)(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii) of this section.
> (h)(5) The term "***resources***" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

Clearly, whether something is an "asset" must be determined at least in part by reference to the provisions of 42 USC 1382b – which the Court of Appeals completely ignored when making its sweeping statement of Congressional intent. The opening paragraphs of 42 USC 1382b(a) contain a lengthy list of "assets" which are excluded from the definition of "resources," which belies the Court of Appeals unlimited conclusion as to Congress' intent that all assets must be considered.

The Court of Appeals also cites 42 USC 1396r-5(c)(2), as one of the "plethora" of federal statutory provisions that support its "view that these "trusts' assets, despite being for the sole benefit of the husbands according to the trusts' language, were correctly determined to be countable assets for purposes of the plaintiffs' Medicaid eligibility".[45] As with the rest of the analysis by the Court of Appeals, it ignores the other applicable provisions of Medicaid law. The section cited by the Court of Appeals reads in part as follows:

> (A) except as provided in subparagraph (B), all the **resources** held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and . . . [46]

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[45] Court of Appeals Opinion, p 10

[46] Id (emphasis added)

So says the Court of Appeals, this section means that the sole benefit trust assets payable to the spouse of the individual applicant are necessarily "attributed" to the individual applicant, and therefore countable assets. But the cited section says nothing about trusts at all, it talks about "**resources**". Nor does it say anything about how an asset is determined to be a "resource". Rather, 42 USC 1396r-5(a)(3) specifically states:

> Except as this section specifically provides, this section does not apply to--
>
> > (A) **the determination of what constitutes income or resources**, or
> > (B) the methodology and standards for determining and evaluating income and resources.
>
> [emphasis added]

That is, 42 USC 1396r-5 does not contain anything about how a determination is made as to "**what constitutes income or resources**" except to reiterate that

> In this section, the term "resources" does not include--
>
> > (A) resources excluded under subsection (a) or (d) of section 1382b of this title, and
> >
> > (B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.[47]

Therefore, the provisions of 42 USC 1396r-5 do not at all address how or when the assets held under a trust are to be counted as "resources". When declaring Congress' intent, the Court of Appeals has completely ignored the various Medicaid rules that discuss how to determine what is or is not a "resource" and also without reviewing the various Medicaid statute provisions which set forth the rules for when assets (or "resources") are or are not "countable".

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[47] 42 USC 1396r-5(c)

The term "resources" has a special meaning under the Medicaid laws, and when administering the Medicaid plan, the state may consider **only** such income and assets as are "available" to the applicant, as determined by the federal rules.[48] Under those federal rules a "resource" is defined as follows:

> "(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.
> (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. **If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).**[49]

Therefore, **as a general rule, assets of any kind are not resources if an individual does not have "the legal right, authority, or power to liquidate them."** This rule is modified as to the "individual" Medicaid applicant by 42 USC 1396p(d)(3)(B), but not as to the "individual's spouse," because the "individual's spouse" is not included under that rule.

In summary, Congress' use of the term "individual" in 42 USC 1396p(d) is intended to and in fact means the "Medicaid applicant" and does not "sub silento" include the spouse of the Medicaid applicant.

IV. THE COURT OF APPEALS ERRED BY NOT FINDING THAT THE DEPARTMENT EXCEEDED ITS AUTHORITY BY MAKING ITS POLICY INTERPRETATION CHANGE RETROACTIVELY APPLICABLE TO

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[48] *Geston v Olson*, 857 FSupp2d 863, 874 (DND 2012); and *Wisconsin Dept of Health and Family Services v. Blumer,* 534 US 473, at 495; 122 Sct 962 (2002)

[49] 20 CFR 416.1201(a); (emphasis added)

APPELLANTS' PREVIOUSLY FILED MEDICAID APPLICATION.

When Appellants submitted their respective applications, the Department's consistent policy interpretation for well over a decade was that spouse sole benefit trusts were not countable assets.[50] Ms. Shrauben (the legal analyst assigned by the Department to evaluate this SBO trust) testified that the interpretation of BEM 401 which she applied to the Sole Benefit Trusts were not being used until mid-August 2014, starting August 13th, but all of Medicaid applications filed in this case were before that date.[51] Ms. Shrauben also acknowledged that the policy interpretation which had been used prior to August 13, 2014, was that the assets of a Sole Benefit Trust such as this were non-countable.[52]

The Department argued that the treatment of SBO Trusts were "clarified" and that the change was required in order to comply with Federal mandates, which the Court of Appeals agreed with. However, this is pure speculation, as no ruling, letter, memorandum, or otherwise from CMS substantiates this claim. The Court of Appeals decision then states that while the Plaintiffs and amicus "cite to cases involving the retroactive application of benefits in somewhat similar scenarios, it appears that those cases generally involve situations where a person was denied benefits that they were entitled to, not situations where a person was denied benefits that they were not entitled to." The Court of Appeal's reasoning has no legal basis.

Appellants demonstrated substantial reliance on the Department's prior policy interpretation when they submitted their applications that included the respective spouse's sole benefit trust, which

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[50] Lollar Tr. ALJ hearing, held 11/5/2014, p 27

[51] See Lollar Tr. ALJ hearing, held 11/5/2014, p 27; Hegadorn Tr. ALJ hearing pp 58-59; Ford Tr. ALJ hearing, held 3/19/2015, p 30

[52] Id.

was not a countable asset under the Department's policy interpretation which was in effect at the time each application was submitted. While an administrative agency has the authority to change its interpretation of the law it is administering, it is severely restricted from doing so retroactively.

In a case involving imposition of inheritance tax to those who inherited the annual installment of a lottery prize, this Court held that the agency could not retroactively apply its new interpretation of the tax law, but rather was bound by its prior construction. Where for over a decade the agency had interpreted the Lottery Act as exempting prizes from the tax, this Court in *D'Amico* observed:

> "It has been held that an administrative agency having interpretive authority may reverse its interpretation of a statute, but that its new interpretation applies only prospectively." Sands, supra, Sec. 49.05, p. 365 [53]

D'Amico is controlling authority in these cases of benefit applicants. Its holding is not limited to those who had the right to lottery payments. The court held the agency had a duty not only to those who won the lottery but to all who "purchased lottery tickets before September 14, 1983."[54] It is beyond question that Appellants here, who applied for assistance with significant nursing home expenses and who arranged their affairs in substantial reliance on longstanding Department policy, had much more investment and expectation than somebody who merely applied "pocket change" to purchase a lottery ticket.

Moreover, retroactive application of an administrative rule that changes settled interpretation of law is strongly disfavored:

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[53] *In re D'Amico Estate*, 435 Mich 551, 460 NW2d 198, 203 (1990).

[54] Id at 564

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a **statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms**. See *Brimstone R Co v U S*, 276 US 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant. (citations omitted).[55]

In his concurrence Justice Scalia underscored the requirement that a rule be of prospective effect by quoting from the authoritative manual on administrative law, the *Attorney General's Manual on the Administrative Procedure Act*:

> Of particular importance is the fact that `rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law.
> .....
> "[T]he entire Act is based upon a dichotomy between rule making and adjudication. . . . Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Id., at 13-14. (underscore added)[56]

Retroactive application of a rule is especially erroneous when applied to persons who have substantially relied upon the prior construction.[57] Michigan courts will look to federal decisions in

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[55] *Bowen v Georgetown Univ Hospital,* 488 US 204, 208-209 (1988); emphasis added.

[56] Id at 218-219.

[57] *Martin v Dep't of Corrections*, 168 Mich App 647, 425 NW 2d 205 (1988) ("the general reliance upon the old rule" is a factor against retroactivity). See also *Northern Pipeline Constr Co v Marathon Pipe Line Co*, 458 US 50, 87-88 (1982), (retroactivity not favored where

resolving questions of retroactivity of decisions.[58] It is settled in federal administrative law that an administrative rule is impermissibly retroactive where the persons affected show substantial and detrimental reliance on an agency's rules. It is also settled that when an agency fails to consider the "serious reliance interests" its prior policy engendered its actions may be characterized as "arbitrary."

> The AP A contains a variety of constraints on agency decision making - the arbitrary and capricious standard being among the most notable. As we held in Fox Television Stations, and underscore again today, the APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." 556 U.S., at 515, 129 S.Ct. 1800 (citation omitted); See also id., at 535, 129 S.Ct. 1800 (KENNEDY, J., concurring in part and concurring in judgment)"[59]

Where as here an agency has consistently and clearly stated its policy, retroactively changing that which has been settled for over a decade is an arbitrary act of administrative power:

> In this case, we might well conclude that where for fifteen years the Board considered conditional negotiation consistent with the statutory design **the ill effect of the retroactive application of a new standard so far outweighs any demonstrated need for immediate application to past conduct . . . as to render the action "arbitrary**.[60]

There is no dispute that the Department dramatically changed its prior policy interpretation

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the "retroactive application 'could produce substantial inequitable results' in individual cases"); *MetWest Inc. v Secretary of Labor*, 560 F. 3d 506, 511 (DC Circuit 2009) (an authoritative departmental interpretation could not be changed without notice and comment where the parties showed "substantial and justifiable reliance on a well-established agency interpretation.").

[58] *Pike v City of Wyoming*, 431 Mich 589, 603-604; 433 NW 2d 768 (1988)

[59] *Perez v Mortgage Bankers Ass'n,*135 S Ct 1199, 1209 (2015).

[60] *NLRB v Majestic Weaving Co*, 355 F2d 854, 859-861 (2d Cir 1966); emphasis added.

that had been in place for well over a decade. Before that change was put into place by the Department starting on August 13, 2014, the Department did not "count" assets held under a spouse sole benefit trust under the circumstances presented by these cases. However, apparently effective August 13, 2014, the Department completely changed that interpretation and viewed such assets as completely countable. That interpretation change should not have been applied to applications filed before the Department made that change, and by doing so, the Department violated the rules set forth above and exceeded its statutory authority. Such an action was properly subject to reversal by the Circuit Court because it has: violated the constitution or a statute, exceeded the agency's authority or jurisdiction, was made upon unlawful procedure, is not supported by competent, material, or substantial evidence, is arbitrary or capricious, or an abuse of discretion, and/or was the result of a substantial or material error of law.

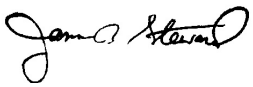
It is beyond argument that Appellants substantially and reasonably relied on the Department's long standing policy of not treating SBO Trusts as available resources. Under no conceivable tenet of administrative law can the Department justify applying its new interpretation of the law to those applicants who had irrevocably transferred assets to sole benefit trusts and applied before its change in interpretation.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the Plaintiffs-Appellants respectfully request that Supreme Court to grant their Application for Leave and reverse and vacate the Court of Appeal's opinion dated June 1, 2017. This relief can be awarded peremptorily or following further argument and/or briefing on the merits.

RESPECTFULLY SUBMITTED,

STEWARD & SHERIDAN, P.L.C.



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